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RECENT DEVELOPMENT

REICHS FORD RD. JOINT VENTURE v. STATE RDS. COMM'N OF THE STATE HIGHWAY ADMIN: DURING THE EXERCISE OF EMINENT DOMAIN, DAMAGES INCURRED FROM A CONDEMNOR'S PRE-CONDEMNATION CONDUCT EVENTUALLY RESULTING IN FORMAL CONDEMNATION PROCEEDINGS CAN GENERALLY BE CALCULATED AS PART OF THE CONDEMNATION AWARD'S "FAIR MARKET VALUE"

By: McEvan H. Baum

The Court of Appeals of Maryland held that damages incurred from a condemnor's pre-condemnation, which eventually results in formal condemnation proceedings, can generally be calculated as part of the "fair market value" of the award. *Reichs Ford Rd. Joint Venture v. State Rds. Comm'n of the State Highway Admin.*, 388 Md. 500, 504, 880 A.2d 307, 309. In so holding, the Court concluded that the Maryland General Assembly intended to compensate property owners for a broad array of deleterious effects caused by the exercise of eminent domain, including damages incurred between the time in which the property owner is notified of the intent to take the property and the time at which the property is actually taken. *Id.* at 521-22, 880 A.2d at 319.

In December of 1988, Maryland's State Highway Administration ("SHA") informed Reichs Ford Joint Venture ("Reichs") that the construction of a newly proposed interchange would substantially affect Reichs's 33,000 feet of commercially zoned land located in Frederick County, Maryland. At the time of notice, Reichs was leasing its land to Griffith Consumers ("Griffith"), which operated a gas station on the property. While the notice provided that SHA would tender a purchase offer within six months, no offer was made. Seven years later, talks continued, but no agreement to sell was reached. In light of the impending condemnation, Griffith chose not to exercise its option to extend the lease term upon its expiration in 1997.

Extreme frustration with SHA's failure to take formal condemnation action was the impetus behind Reichs's filing of a

complaint in the Circuit Court of Frederick County on January 31, 2000. The complaint alleged, under a theory of inverse condemnation, that SHA's looming condemnation plans rendered the property "economically unusable." Finally, in 2001, SHA instituted condemnation proceedings and the parties reached an agreement whereby Reichs would receive \$1,325,000 in damages and could pursue its pre-condemnation damages claim.

With respect to the inverse condemnation action, the circuit court granted SHA's motion in limine to preclude evidence of lost rental income, mortgage interest, and real property taxes. Reichs sought to introduce the evidence to prove damages incurred from the time between Griffith's decision not to exercise its option to extend the lease and Reichs's filing of the complaint. The case was subsequently dismissed.

The Court of Special Appeals of Maryland affirmed, holding that the already settled action for condemnation was the appropriate vehicle in which Reichs should have sought inverse condemnation damages. The Court of Appeals of Maryland granted *certiorari* to consider whether the circuit court erred by granting the motion in limine, which precluded the introduction of evidence of Reichs's pre-condemnation damages.

The Court of Appeals initially examined whether granting SHA's motion in limine was proper. *Id.* at 509, 880 A.2d at 312. First, the Court discussed the property owner's entitlement to just compensation where private property is taken for public use in accordance with the United States and Maryland constitutions. *Id.* at 510, 880 A.2d at 312-13. In *Pumphrey v. State Roads Comm'n*, 175 Md. 498, 505, 2 A.2d 668, 671 (1938), the Court of Appeals concluded that damages in a condemnation proceeding at Maryland common law are measured by the value of the real property taken. *Reichs*, 388 Md. at 510, 880 A.2d at 312-13.

Continuing its analysis, the Court of Appeals acknowledged the case of *Shipley v. Balt. & Potomac R.R. Co.*, 34 Md. 336, 343 (1871), which established that when the government exercised its powers of eminent domain, incidental losses to a real property interest did not generally require compensation. *Id.* at 511, 880 A.2d at 313. However, the Court proceeded to distinguish the case *sub judice*, explaining that Reichs sought damages incidental to *inverse* condemnation, rather than compensation for traditional formal condemnation. *Id.* (emphasis added). In differentiating between the actions, the Court described inverse condemnation as a "shorthand

description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.” *Id.* (citing *U.S. v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130 (1980)).

Next, the Court opined that evidence of lost rental income in a condemnation case is admissible in certain instances. *Id.* at 512, 880 A.2d at 313. The Court cited several condemnation cases involving temporary takings where the proper measure of damages was the lost rental value between the time the property was first taken and the time the property was returned or restored. *Id.* at 512, 880 A.2d at 313-14. In reaching its conclusion that evidence of lost rental income and related damages should not have been excluded, the Court relied on the facts of *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 7, 69 S.Ct. 1434, 1438 (1949), where the government occupied a private laundry facility for the benefit of U.S. Army personnel on a temporary basis. *Id.* at 512, 880 A.2d at 313. There, upon its return to the private owner, the Supreme Court awarded damages for lost rental income while noting that fair market value alone may not suffice for just compensation in a temporary taking. *Id.* at 512, 880 A.2d at 314.

The Court next addressed Reichs’s assertion that an inverse condemnation claim can be made separately from a traditional condemnation action. *Id.* at 513-14, 880 A.2d at 314-15. In so doing, the Court sought to determine whether MD. CODE ANN., REAL PROP. § 12-105 contemplated the inclusion of lost rent and incidental damages between notice and actual condemnation in a “fair market value” award. *Id.* at 516, 880 A.2d at 316. The Court noted that common law defined “fair market value” as “what a reasonable owner, willing but not obligated to sell would accept and a reasonable buyer, willing but not obligated to buy, would pay.” *Id.* at 517, 880 A.2d at 317. (citing *State Road Comm’n v. Warriner*, 211 Md. 480, 485, 128 A.2d 248, 251 (1957)).

The Court, citing *Shipley*, reiterated that it was Legislature’s responsibility to decide if incidental damages should be awarded in a condemnation case in addition to the constitutional minimum of just compensation. *Reichs*, 388 Md. at 517, 880 A.2d at 317 (citing *Shipley*, 34 Md. at 343). The Court noted the General Assembly’s past intent to liberalize both the definition of fair market value and the damages of condemned property owners. *Id.* at 518, 880 A.2d at 317. For example, under §12-105, a jury could consider all diminutions of a property’s value subsequent to the first notice of condemnation. *Id.* at 518-19, 880 A.2d at 317 (see *Mayor of Baltimore v. United Five and*

Ten Cent Stores, 250 Md. 361, 369, 243 A.2d at 521, 525 (1968)). The Court also explained that one's property can suffer a substantial devaluation once notice of future condemnation occurs as a result of vacating tenants, inability to use the property in another manner, maintenance, and moving costs while awaiting formal condemnation. *Id.* at 519, 880 A.2d at 317-318. In concluding §12-105 allows for demonstrable pre-condemnation damages, the Court further declared that the statute's fair market value language includes lost rental income. *Id.* at 520, 880 A.2d at 318.

In this case, the Court established that a property owner's award of "fair market value" in a formal eminent domain proceeding includes pre-condemnation damages. In light of the recent Supreme Court case of *Kelo v. City of New London*, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), which held that the government can exercise its eminent domain power even where its intention is to sell the condemned property to a private developer for economic development, the government is likely to increase its exercise of its eminent domain powers. Therefore, attorneys practicing in Maryland need to be aware of their ability to not only obtain pre-condemnation damages for clients, but also of their option to assert such rights in an action independent from a formal condemnation claim or settlement where justification exists.